In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1259

DENVER AND RIO GRANDE WESTERN RAILROAD CO.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Utah (Pet. App. B–1) is not reported.[1] The opinion of the court of appeals (Pet. App. A) is reported at 385 F. 2d 161.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1967 (Pet. App. A). A petition for re-

[1] The district court cited as the basis for its action a memorandum decision previously entered by it in an identical case, *United States of America* v. *Western Pacific Railroad Co.* The cases were subsequently consolidated on appeal. The *Western Pacific* decision of the district court is reprinted at Pet. App. B–2.

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hearing was denied without opinion on December 26, 1967. The petition for a writ of certiorari was filed on March 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Ex Parte No. 73, governing the extension of credit by railroads, is an order of the Interstate Commerce Commission enforceable under Section 16 (8) of the Interstate Commerce Act, providing for civil fines for a violation of "any order" of the I.C.C.

STATUTES, REGULATION AND ORDERS INVOLVED

The relevant provisions of the Interstate Commerce Act and of the regulations and orders of the Interstate Commerce Commission are set forth in an appendix to this brief, pp. 11–18 *infra*.

STATEMENT

Section 3(2) of the Interstate Commerce Act, 49 U.S.C. 3(2) (p. 11 *infra*), expressly confers upon the Interstate Commerce Commission the power to regulate the extension of credit by railroads to shippers of freight. By its terms, that section prohibits the granting of credit to a shipper for freight charges except as specifically authorized by the I.C.C. Thus, save to the extent that credit is administratively authorized, all freight deliveries must be on a cash-only basis.

Since 1920, pursuant to this authority, the I.C.C., through an order denominated Ex Parte No. 73 (pp. 13–15 *infra*), has strictly limited the time period in which railroads must obtain payment of freight

charges, in order to prevent unjust discriminations among shippers. In 1920, Ex Parte No. 73 required cash payment within a maximum of 96 hours of the delivery of the freight. It was modified by subsequent orders of the I.C.C., issued in 1960, to provide that the maximum period would be 120 hours (pp. 15–18 *infra*).[2]

Sections 16(8) and 16(9) of the Interstate Commerce Act, 49 U.S.C. 16(8), 16(9) (p. 12 *infra*), provide a means for the I.C.C. to enforce orders issued under certain sections of the Act, including Section 3. Specifically, Section 16(8) states in part that:

> any carrier * * * who knowingly fails or neglects to obey *any order* made under the provisions of sections 3, 13, or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. [Emphasis added.]

Section 16(9) provides for the recovery of the forfeiture by the United States by civil suit brought in a district court in any district in which the railroad operates.

On November 1, 1965, the United States commenced this suit against petitioner in the District of Utah. The complaint alleged that the petitioner "frequently and knowingly engaged in the practice of extending credit in excess of 120 hours" in violation of Ex Parte No. 73. (R. 83).[3] The complaint further alleged three

[2] The time limits for the extension of credit established by Ex Parte No. 73, as amended, are also set forth by the I.C.C. as regulations in the Code of Federal Regulations. 49 C.F.R. 142.1b (pp. 12–13 *infra*).

[3] "R." refers to the printed record on appeal filed in the court of appeals.

specific instances of illegal extensions of credit by petitioner for periods ranging from 23 days to 33 days (R. 83–85), and sought statutory forfeitures based upon each of the three violations alleged (R. 86).

The district court dismissed the complaint, ruling that Ex Parte No. 73 was "legislative in character" and not the type of order encompassed by Section 16(8). The court of appeals reversed and remanded the case for trial, holding that Ex Parte No. 73 was an order of the I.C.C. within the meaning of Section 16(8) (Pet. App. A).

ARGUMENT

The decision of the court of appeals correctly gives effect to the plain terms of Section 16(8) and is not in conflict with prior decisions of this Court or any other court.[4] Accordingly, further review would not be warranted even if the decision of the court of appeals were a final judgment. There are no special circumstances calling for review by this Court at the present interlocutory stage of the litigation.

1. The language of Ex Parte No. 73 clearly indicates that it is an order. The decree, both as orig-

[4] The *amicus* brief filed by the Association of American Railroads suggests (Amicus Br. p. 5) that the decision below "would appear" to be in conflict with the decision of this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. A reading of that decision, however, discloses no conflict, real or apparent. *Seatrain* involved an interpretation of a different part of the Interstate Commerce Act, Part III, which regulates water carriers, and dealt with the entirely discrete issue of the difference between the words "order" and "certificate of public convenience" as used in that Part.

inally promulgated in 1920 and as amended in 1960, is headed "ORDER" and employs such phrases as "It is ordered" and "It is further ordered" (pp. 13–18 *infra*). Moreover, Ex Parte No. 73 speaks of reports, investigatory proceedings, hearings, findings, and conclusions, and incorporates such findings and conclusions into the decree (pp. 14, 16–17 *infra*).

The procedure followed by the I.C.C. in promulgating Ex Parte No. 73 and its amendments confirms that it is an order. Section 13(2) of the Interstate Commerce Act, 49 U.S.C. 13(2) (pp. 11–12 *infra*), specifies the procedure to be followed by the I.C.C. in issuing an order. That section provides that the I.C.C. may institute hearings on any matter arising under any provision of the Act and issue orders relating to any matter with which the hearings are concerned. Such orders are to be served upon the railroads. (49 U.S.C. 16(5)).

These procedures were followed in the promulgation of Ex Parte No. 73. The record shows that Ex Parte No. 73 and its amendments were issued after the I.C.C. conducted an investigation and held hearings, notice of which was given to the railroads, who participated in the hearings as parties. Findings of fact and conclusions were made based upon the record developed at the hearing, a report of the I.C.C. was written and filed and appropriate service was made on the railroads (Pet. App. D, pp. 1–13, 42–54; pp. 15–17 *infra*).

Petitioner argues that (Pet. pp. 10–12) the decree is not an order because it fits the definition of "rule" in the Administrative Procedure Act. 5 U.S.C. 551(4)

(Supp. II, 1965–66) (reprinted Pet. App. C, pp. 12–13). But it can equally be argued that Ex Parte No. 73 fits the definition of "order" in the A.P.A. 5 U.S.C. 551(6) (Supp. II, 1965–66) (reprinted Pet. App. C, p. 13). As Professor Davis stated in his treatise:

> The APA by no means solves all problems of classifying proceedings as rule making or adjudication. Most questions concerning classifications of borderline and mixed functions still remain. [1 Davis, Administrative Law, p. 297].

The failure of I.C.C. proceedings and procedures to fit precisely the A.P.A. definitions also may be explained in part by the fact that the Interstate Commerce Act, including the section governing the regulation of credit by railroads, predates the A.P.A. But while the A.P.A. does not clearly place Ex Parte No. 73 in the category of rule or order, we have noted that the procedure followed in the issuance of the decree satisfies the provisions of the Interstate Commerce Act specifying the procedures to be utilized by the I.C.C. in issuing orders. This is the directly relevant, unambiguous guidepost for the I.C.C.

Decisions of this Court, as well as the lower courts, have uniformly treated other decrees of the I.C.C., similar in form and scope to Ex Parte No. 73, as orders of the I.C.C. See, *e.g., United States* v. *Baltimore and Ohio R. Co.,* 293 U.S. 454; *United States* v. *Southern Ry. Co.,* 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031; *State of Georgia* v. *United States,* 201 F. Supp. 813 (N.D. Ga.), affirmed *per curiam,* 371 U.S. 9. The broad scope or legislative nature of I.C.C. decrees has not prevented them from having legal

effect as orders. For example, in the *Assigned Car Cases*, 274 U.S. 564, 574–575, this Court treated a decree regarding the assignment of freight cars as an order even though the decree was "wholly legislative" and prescribed a "uniform rule" and was not based on specific inquiry into a particular practice of an individual carrier. See, also, *United States* v. *Southern Ry. Co.*, 380 F. 2d 49, 52 (C.A. 4).[5]

2. Petitioner further contends (Pet. pp. 7–8) that the I.C.C. has no authority to issue any credit order under Section 3(2).[6] However, Section 13(2) (pp. 11–12 *infra*), authorized the I.C.C. to issue such an order:

> [T]he Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, * * * as to any matter * * * concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. *And the said Commission shall have the* * * *

[5] The I.C.C. is not the only agency that issues broad decrees similar to Ex Parte No. 73 which are treated by the courts as orders. See, *e.g.*, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 425.

[6] To the extent the argument that the I.C.C. had no authority to issue an order regulating credit involves an attack upon the validity of the credit order, the courts are without jurisdiction to decide the issue in this case. A challenge to the validity of any order of the I.C.C. may be made only through special proceedings before the I.C.C. leading to judicial review by a three-judge court with direct appeal to this Court. See 28 U.S.C. 1253, 2325, 49 U.S.C. §§ 17(6), 17(9); *United States* v. *Southern Ry.*, 380 F. 2d 49 (C.A. 4); *United States* v. *Southern Ry.*, 364 F. 2d 86 (C.A. 5), certiorari denied, 386 U.S. 1031.

> *power to make and enforce any order * * * relating to the matter * * * concerning which the inquiry is had * * *.* [Emphasis added.]

Thus, in issuing Ex Parte No. 73, the I.C.C., pursuant to Section 13(2), conducted inquiry or hearing on a "matter" involving the extension of credit arising under Section 3(2), one of the "provisions of this chapter". Based on this hearing, it formulated and issued an order "relating to the matter * * * concerning which the inquiry [was] had * * *" limiting the extension of credit to no more than 120 hours.[7]

Petitioner points, however, to the fact that Section 3(2) refers to "rules and regulations" and urges that this reference deprives the I.C.C. of the power also to issue an order thereunder (Pet. pp. 7–8). This contention not only overlooks the express statutory authorization in Section 13(2) for issuing an order, but also is premised upon an unduly literal and restrictive interpretation of the Interstate Commerce Act.

The Interstate Commerce Act is remedial in nature and, therefore, is to be liberally construed to accomplish the public purpose which it was enacted to serve. *New York, N.H. and H.R.R.* v. *I.C.C.*, 200 U.S. 361, 391. Nevertheless, petitioner urges (Pet. pp. 7–8) a narrow construction that would unduly constrict the I.C.C.'s remedial powers to achieve the purpose of the

[7] Since Section 16(8) of the Act provides for civil forfeitures for a violation of "any order" of the I.C.C. made under § 3 or § 13, it is immaterial whether Ex Parte No. 73 is viewed as arising under § 13 or § 3(2) or both.

legislation.[8] In a markedly similar context, such a narrow construction was necessarily rejected in the *Assigned Car Cases*, 274 U.S. 564, in which this Court upheld an "order" of the I.C.C. that was issued under Section 1(14) of the Act, 49 U.S.C. 1(14), which by its express terms provides only for *"rules, regulations, and practices."*[9]

3. Petitioner correctly notes that a railroad violating the credit restrictions promulgated by the I.C.C. may be subject to criminal penalties under Section 10(1) of the Interstate Commerce Act, 49 U.S.C. 10(1), and Section 1 of the Elkins Act, 49 U.S.C. 41(1) (both reprinted Pet. App. C. pp. 3–4, pp. 11–12), as well as civil sanctions under Section 16(8) of the Interstate Commerce Act (Pet. pp. 12–13). However, the mere fact that certain conduct of petitioner has been construed as subjecting it to the possibility of either civil or criminal sanctions under

[8] Nothing in the legislative history discussed by the *amicus* demonstrates that Congress intended to deprive the I.C.C. of authority to issue orders regulating credit (Amicus Br. pp. 7–9). If anything, the legislative history supports the position that Congress intended the I.C.C. to use § 16(8) to enforce orders issued under § 3(2) for at the time Congress amended the Interstate Commerce Act to add Section 3(2), 41 Stat. 479, it also amended the Act to add Section 16(8), 41 Stat. 492, providing for a forfeiture for a violation of "any order" issued, *inter alia*, under Section 3.

[9] The language employed by Congress in conferring regulatory powers upon the I.C.C. varies from provision to provision of the Act. For example, § 13(3) permits the I.C.C. to make "*rules*"; § 5(b) "*rules and regulations*"; § 15(1) "order"; § 15(2) "orders"; § 15(9) "*order, rule, or regulation*"; § 1(16) "*directions*"; § 1(14) "*rules, regulations, and practices*".

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different statutory sections, or both, does not, as petitioner maintains, mean there is a conflict between these statutory sections. The statutory scheme clearly provides—and this is far from uncommon—that the agency shall have two different enforcement remedies available, one civil and one criminal, to be used separately or in conjunction, at the discretion of the authorities.[10]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[10] The civil penalty provided for by § 16(8) is a mandatory fine of $5,000 for each offense. As noted, pp. 3–4 *supra*, petitioner is being sued by the I.C.C. for a total $15,000 for three separate offenses involving delays in collecting freight payments ranging from 23 to 33 days.

The criminal penalties provided by 49 U.S.C. 10(1) and 41(1) with regard to rate discriminations are conviction of a misdemeanor with imprisonment for up to two years and/or a maximum fine of $20,000.

APPENDIX

1. The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. 1 *et seq.* are as follows:

Section 3(2), 49 U.S.C. 3(2) provides as follows:

> No carrier by railroad * * * subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight * * * shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges * * *.

Section 13(2), 49 U.S.C. 13(2) provides as follows:

> Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by

complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

Section 16(8), 49 U.S.C. 16(8) provides as follows:

> Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13 or 15 of this title shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

Section 16(9), 49 U.S.C. 16(9) provides as follows:

> The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

2. The relevant provisions of 49 C.F.R. 142.1b, are as follows:

> Effective on March 10, 1961, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for 96 hours and 120 hours in

respect of charges on carload traffic, in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96 hour periods.

3. The relevant provisions of Ex Parte 73 and its amendments are as follows:

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 4th day of June, A.D. 1920.

Ex Parte No. 73.

In re Section 3 of the Interstate Commerce Act, as amended by Section 405 of the Transportation Act, 1920.

It appearing, That section 3, paragraph (2), of the interstate commerce act, as amended by section 405 of the transportation act, 1920, provides:

From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following rules and regulations be, and they are hereby, prescribed to become effective on July 1, 1920, and to remain in force until the further order of the Commission:

1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges within the period of credit herein specified, may relinquish possession of the freight in advance of payment of the tariff charges thereon and may extend credit in the amount of such charges to those who undertake to pay such charges, such persons being here in called shippers, for a period of ninety-six hours to be computed as follows:

(A) Where the freight bill is presented to the shipper prior to, or at the time of, delivery of the freight the ninety-six hours of credit shall run from the first 4:00 p.m., following the delivery of the freight.

(B) Where the freight bill is presented to the shipper subsequent to the time the freight is delivered the ninety-six hours of credit shall run from the first 4:00 p.m., following the presentation of the freight bill.

2. Every such carrier shall present freight bills to shippers not later than the first 4 p.m. following delivery of the freight, except that when information sufficient to enable the carrier to compute the tariff charges is not then avail-

able to the carrier at the delivery point, the freight bills shall be presented not later than the the first 4 p.m., following the day upon which sufficient information becomes available to the delivering agent of the carrier.

3. Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

4. Sundays and legal holidays, other than Saturday half holidays, may be excluded from the computation of the period of credit.

5. The mailing by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. In case of dispute as to the time of mailing the postmark shall be accepted as showing such time.

ORDER

Title 49—Transportation; Chapter I—Interstate Commerce Commission; Subchapter A—General Rules and Regulations; Part 142—Extension of Credit to Shippers.

Ex Parte No. 73

Regulations For Payment of Charges

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 19th day of May, A.D. 1960.

It appearing, That by order dated August 6, 1958, the Commission reopened this proceeding

for further hearing for the purpose of determining whether the time should be extended within which freight charges on carload traffic may be paid;

It further appearing, That a further hearing has been held, and that a full investigation of the matters and things involved has been made, and the Commission, on the date hereof, having made and filed a report on further hearing, which report, together with the prior reports herein, are hereby referred to and made a part hereof:

It is ordered, That the order entered herein on January 20, 1931, as modified, and the regulations issued thereunder, 49 CFR 142, be, and they are hereby further modified by adding after § 142.1a the following:

§ 142.1b Carload traffic. Effective on July 7, 1960, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for 96 hours and 120 hours in respect of charges on carload traffic, in lieu of 48 hours and 96 hours, respectively, under the present rules in this part, computation of time to be made in the same manner as provided in connection with the 48-hour and 96-hour periods. (See Sec. 142.2)

It is further ordered, That in all other respects said order of January 20, 1931, as modified, and said regulations shall remain in full force and effect.

And it is further ordered, That notice to the general public shall be given by depositing a copy hereof in the Office of the Secretary of the Commission, Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

(Sec. 3(2), 24 Stat. 380, as amended, 49 U.S.C. 3.)

By the Commission.

ORDER

Title 49—Transportation; Chapter I—Interstate Commerce Commission; Subchapter A—General Rules and Regulations; Part 142—Extension of Credit to Shippers

Ex Parte No. 73

Regulations For Payment Of Charges

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 30th day of December, A.D. 1960.

It appearing, That on May 19, 1960, the Commission made and filed a report and order in this proceeding, 310 I.C.C. 391, and that thereafter, upon petition of the protestants and replies thereto, the proceeding was reopened for reconsideration;

It further appearing, That the Commission, on the date hereof, has made and filed a report on reconsideration, which report, together with the prior reports and orders herein, are hereby referred to and made a part hereof:

It is ordered, That the order entered in this proceeding on May 19, 1960, as modified, authorizing the extension of credit on carload traffic to 96 hours and 120 hours, in lieu of 48 hours and 96 hours, respectively, the effective date of which was postponed until the further order of the Commission, be, and it is hereby, reinstated and modified, so as to become effective on March 10, 1961.

It is further ordered, That the regulations issued under the order of May 19, 1960, as modified, 49 CFR 142.1b, be, and they are hereby, further modified by deleting the date of July 7, 1960, and substituting in its place the date March 10, 1961.

It is further ordered, That in all other respects said order of May 19, 1960, as modified, and said regulations shall remain in full force and effect.

And it is further ordered, that notice to the general public shall be given by depositing a copy hereof in the Office of the Secretary of the Commission, Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

(Sec. 3(2), 24 Stat. 380, as amended, 49 U.S.C. 3)

By the Commission.

U.S. GOVERNMENT PRINTING OFFICE: 1960